

STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, NEW HAMPSHIRE



V

JACK KIMBALL
aka SEARAY REALTY

DECISION OF THE HEARING OFFICER

Nature of Dispute: RSA 275:43 I unpaid wages
RSA 275:42 I/II employer/employee relationship

Employer: Jack Kimball AKA Searay Reality, 45 Allen St. Ste. 3, Rochester, NH
03867

Date of Hearing: March 4, 2015

Case No. 49585

BACKGROUND AND STATEMENT OF THE ISSUES

A Wage Claim was filed with the Department of Labor on December 15, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on February 10, 2015. The claimant is seeking \$3,000.00 in unpaid wages.

There is an issue of employer/employee relationship and that must be determined first in order for the Wage Claim to go forward. If there is no employer/employee relationship then the Wage Claim forum is not the proper place to resolve the issue.

The claimant testified that she was hired by the Bob Smith for Senate Campaign. She was hired by Bob Smith. The claimant had been working on another campaign, in a paid position, when she came on board the Smith campaign. She considered herself a 1099 employee and was to pay her own taxes.

After being hired, the claimant stated that Jack Kimball came on as the campaign manager. He said that she would be paid. There is no hiring agreement and any time sheets were submitted to Bob Smith. She said that she agreed to a wage of \$3,000.00 a month and was paid \$6,000.00. She is owed the last month of her work in the amount of \$3,000.00. When she submitted her invoices, Jack Kimball issued checks from his Real Estate holding company to pay her wages.

The employer, Jack Kimball, testified that he was never the employer. The claimant was hired by Bob Smith and any agreement was with Bob Smith. He further stated that no employees of the campaign were ever paid.

Jack Kimball testified that he felt bad for the claimant and the fact that she had no wages to continue on the campaign and to fund her lifestyle. He said that he had a Real Estate Holding Company, Searay Realty, he issued two payments from the holding company to the claimant. These were to pay off the invoices submitted by the claimant for two months of work. Mr. Kimball said that he was going to be reimbursed by the campaign and he stated that he has been reimbursed for \$3,000.00.

FINDINGS OF FACT

RSA 275:43 I Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee:

- (a) In lawful money of the United States;
- (b) By electronic fund transfer;
- (c) By direct deposit with written authorization of the employee to banks of the employee's choice;
- (d) By a payroll card provided that the employer shall provide to the employee at least one free means to withdraw up to and including the full amount of the employee balance in the employee's payroll card or payroll card account during each pay period at a financial institution or other location convenient to the place of employment. None of the employer's costs associated with a payroll card or payroll card account shall be passed on to the employee; or
- (e) With checks on a financial institution convenient to the place of employment where suitable arrangements are made for the cashing of such checks by employees for the full amount of the wages due; provided, however, that if an employer elects to pay employees as specified in subparagraphs (b), (c), or (d), the employer shall offer employees the option of being paid as specified in subparagraph (e), and further provided that all wages in the nature of health and welfare fund or pension fund contributions required pursuant to a health and welfare fund trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of employees and agreed to by the employer shall be paid by every such employer within 30 days of the date of demand for such payment, the payment to be made to the administrator or other designated official of the applicable health and welfare or pension trust fund.

This is the section of the law that mandates an employer to pay an employee all wages due at the time the wages are due and owing.

RSA 275:42 I. The term "employer" includes any individual, partnership, association, joint stock company, trust, corporation, the administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor of any of the same, employing any person, except employers of domestic labor in the home of the employer, or farm labor where less than 5 persons are employed.

RSA 275:42 II. "Employee" means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

This part of the law spells out when a person is an employee of an employer.

It is the finding of the Hearing Officer, based on the written submissions and the testimony of the parties, that there is no employer/employee relationship. The claimant has the burden to show that she was an employee of the employer and in this case she did not do that.

The claimant was hired by former United States Senator, Bob Smith, to work on the Bob Smith for Senate Campaign. There was an agreed upon wage. At a point, later in the campaign, Jack Kimball came on as the Campaign Manager. The testimony of Mr. Kimball is credible in that he had no control over the finances of the campaign or the paying of bills. He used his holding company's funds to help the claimant and expected reimbursement from the campaign. He also stated that there was no money being raised and the campaign was discontinued at a certain point.

The claimant invoiced her work and reported to the Bob Smith for Senate Campaign. There is no employer/employee relationship with Mr. Kimball. The Wage Claim forum is not the proper avenue for a settlement.

DECISION AND ORDER

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

The Wage Claim format is not valid for this claim.

Thomas F. Hardiman
Hearing Officer

Date of Decision: March 18, 2015

TFH/kdc